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91-751

No. _____

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SULTAN ALLIBHAI AND YASMIN ALLIBHAI,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether government agents who lack any reason to suspect past, current, or incipient criminal activity legitimately may aim a money laundering "sting" operation at an individual who has never engaged in criminal activity of any kind?

2. Absent a reasonable suspicion requirement, is investigative discretion limited when targets are selected based on their exercise of a right secured by the First Amendment?

OPINIONS BELOW

The Fifth Circuit opinion appears at 939 F.2d 244 (1991).

JURISDICTION

The judgment of which the petitioner seeks review was entered August 6, 1991. No petition for rehearing was filed. No extension of time for filing this petition has been granted. Rule 12.3 is not applicable. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the Constitution of the United States. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fifth Amendment to the Constitution of the United States. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

I. Basis for Federal Jurisdiction

The petitioners were indicted by a federal grand jury and tried for violations of the federal money laundering statute, 18 U.S.C. § 1956, and related crimes. The District Court for

the Northern District of Texas, Dallas Division, had jurisdiction in these criminal cases pursuant to 18 U.S.C. § 3231.

II. Statement of Facts

The appellate court summarized the facts relating to the Allibhais' investigation and arrests as follows:

> Acting on a tip from the Customs Service that Nizamudin Alibhai had been illegally transferring large sums of cash out of the United States, agents initiated an investigation of suspected money laundering activities in the Dallas area. Their information led them to a Dallas bank, where Nizamudin and the appellant Sultan Allibhai purportedly maintained accounts. Although agents confirmed Nizamudin and Sultan were not related, the appellant was nonetheless targeted by the government in its investigation.
>
> In order to gain access to Sultan and other suspected money launderers, the government enlisted the cooperation of Al Hassam, a former Dallas resident who was, like Sultan and others on the government's list of suspects, an Ismaili Muslim.[1] The agents contacted

[1] The appellants make much of their affiliation with the Ismaili Muslim community, a small subsect of the Shi'ite Muslim faith.* As a leader in the Dallas Ismaili community, Sultan collected the sums the Ismaili faithful were obliged to tithe to the Aga Khan, sending the money out of the United States. Sultan suggests that these legitimate activities first aroused the suspicions of government agencies.

> * [At sentencing, Sultan Allibhai submitted information on Ismaili history in an affidavit of Mahommed Jaffer and an academic paper, "The Ismailis: A Short Survey" by Jere L. Bacharach. These materials are appended to this petition.
>
> The history of the Ismaili Muslims extends 1400 years. (Jaffer Aff., App. p. 19-20.) Islam emerged in the seventh century A.D. (Bacharach at 1.) Early in Muslim history, a split developed between Sunni and Shi'ite Muslims over the identity of the rightful successor to Muhammad, believed to be Allah's last prophet. (Bacharach, App. p. 33-34.) Over the next century and a half, the Shi'ites, who were the smaller group, split into subgroups, including Ismailis. (*Id.* at 34-35.) Members of the sect number

(continued on page 4)

Hassam, presented him with a list of primarily Ismaili names, and asked him if he recognized any of those listed. Hassam indicated that Sultan was a childhood schoolmate, but he professed he was unaware of his involvement in any illegal activities.

The agents decided that Hassam would pose as an insurance agent interested in exporting large sums of honest or ill-gotten gains out [of] the United States for clients. Hassam contacted Sultan in Dallas, renewed their acquaintance, and invited him and his wife Yasmin to meet him at his hotel. At that meeting, Hassam indicated that he was looking for a money launderer, and asked Sultan for a recommendation. Sultan advised Hassam that he need look no further, as he had previously engaged in such activities in Africa.

Hassam and Sultan eventually agreed on the details of their business arrangement: money skimmed from the proceeds of legitimate businesses or derived from illicit drug trafficking would be transported out of the country by Sultan. For his efforts, Sultan would receive a "handling fee" equivalent to two and one-half percent of the sums laundered. Other details regarding their first transaction were left unresolved, and Hassam returned to his home in Virginia.

Over the next three months, Sultan and Yasmin

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[1] *(...continued)*

about 20 million and can be found throughout the world, particularly in India, Pakistan, and East Africa. (Jaffer Aff., App. p. 19.) There is a small community in the United States. *(Id.)*

Through the course of history, Ismailis have been persecuted for their faith, particularly by the Sunni Muslims. (*Id.* at 23.) Their concern for persecution continues into the twentieth century. (*Id.*) For that reason and because of their religious tradition, many Ismailis keep private the practice of their faith, including the process of making offerings to the Aga Khan, their spiritual leader. (*Id.*)

The petitioners are Ismaili Muslims. Sultan Allibhai is a muhki, or minister, in the Dallas Ismaili community.]

cooperated with Hassam in completing several transfers of money out of the United States. Typically, Hassam would meet Sultan at the appointed location, deliver to him a large sum of money in either large bills or cashier's checks, and provide Sultan with information as to where the money should be delivered. Sultan would carry the cash out of the country, neglecting to declare it on the U.S. Customs forms that require disclosure of cash sums in excess of $10,000. After arriving in Brussels or Toronto, Sultan would deposit the money into an account in a specified bank. Later, he would cause the money to be transferred via wire to bank accounts in the United States established and maintained for the purposes of such sting operations.

Throughout this time, Yasmin assisted Sultan in these activities by relaying messages to him from Hassam, or occasionally accepting cash deliveries from Hassam in her husband's stead. On at least one occasion, Yasmin made the actual delivery of the money to Brussels.

Later, the government substituted undercover agent Ralph Jacoby for Hassam as Sultan's contact. Jacoby represented to Sultan that he needed very large sums derived from illegal drug operations exported out of the country. Jacoby and Sultan agreed to do business on terms similar to those arranged with Hassam, with Sultan expressing interest in trafficking even larger sums than before. For the next several months, Sultan and Yasmin continued transporting money out of the country, frequently enlisting the aid of two co-defendants not parties to this appeal.

By the year's end, the government felt it had sufficient evidence to bring Sultan, Yasmin, and the two co-defendants to trial. It therefore suspended the sting operation for approximately six months. The government later reactivated the scheme, hoping to ferret out

> additional members of Sultan's organization. With renewed interest, Sultan and Yasmin revived their laundering activities, dealing with Agent Jacoby as before. By the time of their arrest, the players had laundered over $1.5 million [sic], for which the Allibhais received over $76,000 in commissions.
>
> Sultan, Yasmin, and two co-defendants were tried on twenty-four counts of conspiracy, money laundering, failing to file IRS currency transaction reports, failing to file customs reports, travel in interstate commerce with the intent to carry on unlawful activities, and wire fraud. Sultan was convicted on all counts, while Yasmin was convicted on three and acquitted on three.

Allibhai, 939 F.2d at 247-48. The Fifth Circuit affirmed all convictions.

ARGUMENT

Last April, this Court granted review of *United States v. Jacobson*, 916 F.2d 467 (8th Cir. 1990) (*en banc*). 59 U.S.L.W. 3723 (April 26, 1991). *Jacobson* presents the question whether the government must have some reason to suspect criminal activity before targeting an individual in a "sting" operation. The Eighth Circuit declined to adopt such a requirement.

This case presents the same issue. In addition, it raises the question whether, even absent a reasonable suspicion requirement, there may exist improper grounds for targeting. Specifically, does a groundless investigation aimed at members of a minority religious group infringe upon First Amendment liberties?

I. Is Reasonable Suspicion of Criminal Activity Required to Target an Individual for Investigation?

Government agents targeted Allibhai and others in the Dallas Ismaili community for an undercover "sting" operation without reason to suspect past, current, or incipient criminal

activity. Allibhai raised the defense of outrageous government conduct.

The outrageous government conduct defense originated with a noted dissent in *Olmstead v. United States,* 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928). Justice Brandeis championed "the right to be let alone – the most comprehensive of rights and the right most valued by civilized men." *Id.* at 478. The defense enforces the principle that law enforcement agents must not generate crime merely for the sake of prosecuting and punishing a defendant. *See United States v. Ramirez,* 710 F.2d 535, 540 (9th Cir. 1983).

In *United States v. Russell,* 411 U.S. 423, 93 S. Ct. 1637, 36 L. Ed. 2d 366 (1973), the Court allowed the possibility of a constitutional defense where "the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Id.,* 411 U.S. at 431-32 (*quoting Kinsella v. United States*, 361 U.S. 234, 246, 80 S. Ct. 297, 4 L. Ed. 2d 268 (1960).

In *Hampton v. United States,* 425 U.S. 484, 96 S. Ct. 1646, 48 L. Ed. 2d 113 (1976), five justices rejected the claim that due process would never bar conviction, no matter how outrageous the government's conduct. Thus outrageous government conduct is a defense separate from entrapment, and available regardless of the defendant's predisposition. *Id.* at 492 (Powell, J., concurring, joined by Blackmun, J.), *Id.* at 497 (Brennan, J., dissenting, joined by Stewart, J. and Marshall, J.).

Appellate courts subsequently have overturned convictions obtained by government agents' over-involvement in the execution of crime.

For example, in *United States v. Bogart,* 783 F.2d 1428 (9th Cir. 1986), the court held that law enforcement conduct violates constitutional standards when government agents effectively generate new crimes merely for the sake of

pressing criminal charges against the defendant. *United States v. Twigg*, 588 F.2d 373 (3rd Cir. 1978), held that due process barred the government from generating new crimes for the sake of prosecution and punishment when the defendant previously was lawfully and peaceably minding his own affairs. *Accord, Greene v. United States*, 454 F.2d 783, 787 (9th Cir. 1971) (reversing convictions where government did not attach itself to an ongoing criminal enterprise but rather engaged in "creative activity").

In *United States v. Lard*, 734 F.2d 1290 (8th Cir. 1984), the court held that the defendant was entrapped as a matter of law, but discussed outrageous government conduct as well:

> Finally, we should add that, apart from the entrapment defense, agent Anderson's over-involvement in conceiving and contriving the crimes here approached being 'so outrageous that due process principles should bar the government from invoking judicial process to obtain a conviction.' (Citations omitted) Anderson's conduct was not aimed at facilitating discovery or suppression of ongoing illicit dealings .... Rather it was aimed at creating new crimes for the sake of bringing criminal charges against Lard, who, before being induced, was lawfully and peacefully minding his own affairs....Concepts of fundamental fairness preclude us from putting our imprimatur on law enforcement overreaching conduct designed to instigate 'a criminal act by persons 'otherwise innocent in order to lure them to its commission and to punish them."

Id. at 1296-97.

Allibhai submitted to the Fifth Circuit that outrageous conduct may occur in the decision to undertake an investigation as well as in the pursuit of the investigation. Allibhai argued that commencement of a sting operation, without reason to suspect prior wrongdoing, is itself sufficient indication of government over-involvement or "creative activity," regardless of the government's level of participation in executing its criminal plan. Appealing to concerns

of fundamental fairness, he asked that the government be restrained from instigating random police investigations, intruding into the lives of individuals who are lawfully minding their business.

The Fifth Circuit declined to adopt a reasonable suspicion requirement for sting operations. It relied in part upon the Eighth Circuit's opinion in *Jacobson, supra,* holding that "[a defendant] has no constitutional right to be free of investigation." *Allibhai, supra (quoting Jacobson,* 916 F.2d at 469). The court held that the entrapment defense adequately remedied a situation in which a suspicionless investigation "ensnares a non-predisposed individual," blurring the distinction between the two defenses and founding both on lack of predisposition. That holding directly conflicts with this Court's decisions that outrageous government conduct, that is, government over-involvement in crime, may invalidate a conviction regardless of a defendant's predisposition. *See Russell, supra; Hampton, supra.* The Fifth Circuit effectively stated that a targeting decision could never, under any circumstances, amount to outrageous government conduct. *Id.* at 249.

II. Assuming No "Reasonable Suspicion" Limitation on Targeting Discretion, May Agents Select Targets on the Basis of Activities Protected by the First Amendment?

In *Jacobson,* the claim of improper investigation and targeting was based entirely upon the lack of reasonable suspicion. This case presents an additional factor: all of those targeted shared a common ethnicity and adherence to a minority religious faith.

A. The Fifth Circuit Incorrectly Analyzed this Question Under the Free Exercise Clause

Allibhai suggested to the Fifth Circuit that, if the court declined to require reasonable suspicion generally, it should impose limits where targets appeared to have been chosen

on an improper criterion. He submitted his case as an example of the potential for abuse in unfettered targeting discretion.

Responding to this claim, the Fifth Circuit invoked free exercise analysis, relying upon *Employment Division Department of Human Resources v. Smith,* 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990). In *Smith,* two Native Americans were fired from their jobs for using peyote in a religious ceremony. When the state denied them unemployment benefits because of this "misconduct," they claimed a violation of their First Amendment free exercise rights. This Court upheld the state's action: "we have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate." *Id.,* 108 L. Ed. 2d at 885.

Relying on *Smith* to validate the religious focus of the sting operation, the Fifth Circuit held:

> Although we recognize that this is not a case involving the free exercise clause, we consider the court's teachings in *Smith* persuasive on this issue. Ismaili Muslims are not "relieved ... from obedience to a general law not aimed at the promotion or restriction of religious beliefs." [*Smith,* 110 S. Ct. at 1600], *quoting Minersville School District Board of Education v. Gobitis,* 310 U.S. 586, 594-595, 60 S. Ct. 1010, 1012-1013, 84 L. Ed. 1375 (1940). Thus, when the government seeks to enforce a "valid and neutral law of general applicability," *Smith,* 110 S. Ct. at 1600, the fact that an investigation incidentally targets a specific religious group does not render the investigation violative of the first amendment.

Allibhai, 939 F.2d at 250. Although the court "recognized" that no free exercise issue was presented, it applied free exercise analysis. The flaw in this reasoning is apparent. Allibhai did not contend that money laundering is an element of his religious practice or that being an Ismaili immunizes him from criminal liability under a generally applied statute.

Rather, he argued that his selection for targeting was improper because it arose from a groundless investigation focused exclusively upon members of his religious group.

In short, Allibhai sought no exemption from a generally applied law. The *Smith* reasoning rests on the pertinent law's neutrality toward religion and general application. Here the government selected Allibhai *because* he was an Ismaili Muslim. Allibhai challenges the *lack* of neutrality in the government's conduct toward his religion. He does not seek, as the *Smith* plaintiffs did, to single himself out; rather, he claims that the government singled him out. Free exercise analysis has no application to such a claim. The Fifth Circuit simply misapplied the *Smith* decision, treating the case as though the government had infiltrated an ongoing criminal enterprise that happened to involve a religious minority. *See id.* at 250. Its reasoning did not address the legitimacy of selecting targets on the basis of their religion.

B. The First Amendment Prohibits Baseless Investigative Targeting Focused on a Religious Group

This Court has not addressed the scope of the outrageous government conduct defense, which has been described as "at best elusive." *United States v. Driscoll,* 852 F.2d 84 (3rd Cir. 1988), *quoting United States v. Janotti,* 673 F.2d 578 (3rd Cir. 1982). Particularly if the Court declines to impose a generally applicable reasonable suspicion requirement, illumination of this check on investigative authority is warranted. It simply cannot be, as the Fifth Circuit assumed, that religious and ethnic groups are without protection from an investigation focused on them *because* of faith or color. *Jacobson* presents the question whether some reasonable suspicion is required before the government attempts to induce an individual into crime. Even a holding that agents may investigate without reasonable suspicion, however, would not determine their authority to investigate on any basis they wish. Here, it appears that agents selected targets, not randomly, but upon an improper criterion.

The absence of a reasonable suspicion requirement does not necessarily imply an absence of constitutional constraints on targeting discretion. Suspicionless investigations easily may become tools of political or religious oppression. *See* Gershman, *ABSCAM, the Judiciary and the Ethics of Entrapment,* 91 Yale L.J. 1565 (1982).

Where constitutional protections are at stake, this Court has restricted government discretion to investigate and prosecute:

> [A]lthough prosecutorial discretion is broad, it is not 'unfettered.' Selectivity in the enforcement of criminal laws is ... subject to constitutional constraints. *United States v. Batschelder,* 442 U.S. 114, 125, 60 L. Ed. 2d 755, 99 S. Ct. 2198 (1979) (footnote omitted). In particular, the decision to prosecute may not be 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification,' *Bordenkircher v. Hayes, supra,* at 364, 54 L. Ed. 2d 604, 98 S. Ct. 663, *quoting Oyler v. Boles,* 368 U.S. 448, 456, 7 L. Ed. 2d 446, 82 S. Ct. 501 (1962), including the exercise of protected statutory and constitutional rights, *see United States v. Goodwin, supra,* at 372, 73 L. Ed. 2d 74, 102 S. Ct. 2485.

Wayte v. United States, 470 U.S. 598, 608, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985); *see also Gibson v. Florida Legislative Investigation Committee,* 372 U.S. 539, 557, 83 S. Ct. 889, 9 L. Ed. 2d 929 (1963) (government may not investigate membership records of political or religious organizations without demonstrating "compelling and subordinating government interest").

The federal circuits enforce similar boundaries. For example, in *Ealy v. Littlejohn,* 569 F.2d 219 (5th Cir. 1978), the court prohibited groundless grand jury interrogation of members of a civil rights group, stating:

> It would be a sorry day were we to allow a grand jury to delve into the membership, meetings, minutes, organizational structure, funding and political activities of

> unpopular organizations on the pretext that their members might have some information relevant to a crime.

Id. at 229; *see also United States v. Aguilar,* 883 F.2d 662, 705 (9th Cir. 1989), *cert. denied,* ___ U.S. ___, 111 S. Ct. 751, 112 L. Ed. 771 (1991) (when government employs undercover informers to infiltrate political or religious groups it must show that its investigation is being conducted in good faith and not for the purposes of abridging First Amendment freedoms); *Clark v. Library of Congress,* 750 F.2d 89 (D.C. Cir. 1984) (government investigation of employee based on his political beliefs and activities must be justified by vital governmental interest).

The government's self-imposed guidelines recognize that investigations of minority or religious groups raise special concerns. One of the general principles governing the Attorney General's Guidelines reads as follows:

> In its efforts to anticipate or prevent crime, the FBI must at times initiate investigations in advance of criminal conduct. It is important that such investigations not be based solely on activities protected by the First Amendment or on the lawful exercise of any other rights secured by the Constitution of the United States.

The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Domestic Security/Terrorism Investigations, 32 Crim. L. Rptr. 3087 (1983). The guidelines classify investigations into political or religious groups or their members as "sensitive criminal matters" and impose higher standards of care and supervision in these cases. *Id.* at 3088-90.

Obviously, investigative targeting is permissible, no matter the subject, when a person's conduct draws suspicion of criminal activity. The Fifth Circuit holds that targeting is permissible even absent such suspicion. When the government targets innocent individuals, however, the question

must arise: if suspicion of crime is not the government's reason, what is? Certainly the object's adherence to an unpopular religious faith is not a legitimate motivation worthy of this Court's approval.

CONCLUSION

The Supreme Court has not addressed the question, presented in *Jacobson* and here, whether government agents may target previously law-abiding persons for "sting" operations. Neither has it defined the scope of the outrageous government conduct defense, particularly as it relates to targeting decisions.

Whether or not government agents may randomly choose targets for investigation, certainly they may not baselessly invade a particular religious faith, attempting to create crime and generate prosecution. The Fifth Circuit misapplied the law mandating government neutrality toward religion, authorizing government encroachment on First Amendment freedoms.

The legitimacy of suspicionless investigations, and particularly of such investigations directed at ethnic and religious minority groups, are important questions which have not been, but should be, settled by the Supreme Court.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 90-1354

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

YASMIN ALLIBHAI and SULTAN ALLIBHAI,

Defendants-Appellants.

Appeals from the United States District Court
For the Northern District of Texas

(August 6, 1991)

Before SMITH AND DUHÉ, Circuit Judges, and POLOZOLA, District Judge.*

DUHÉ, Circuit Judge:

Raising a variety of complaints, appellants Yasmin and Sultan Allibhai challenge their convictions and sentences for money laundering. They argue that the government unjustifiably targeted them in its sting operation, that the district court improperly instructed the jury on the entrapment defense, and that the court erred in excluding the testimony of their expert witness. The appellants also argue that the district court improperly applied the sentencing guidelines, contending that the court based its sentencing decisions on irrelevant or erroneous factual findings. Finding no error, we affirm.

---

* District judge of the Middle District of Louisiana, sitting by designation.

Facts and District Court Proceedings

Acting on a tip from the Customs Service that Nizamudin Alibhai had been illegally transferring large sums of cash out of the United States, agents initiated an investigation of suspected money laundering activities in the Dallas area. Their information led them to a Dallas bank, where Nizamudin and the appellant Sultan Allibhai purportedly maintained accounts. Although agents confirmed Nizamudin and Sultan were not related, the appellant was nonetheless targeted by the government in its investigation.

In order to gain access to Sultan and other suspected money launderers, the government enlisted the cooperation of Al Hassam, a former Dallas resident who was, like Sultan and others on the government's list of suspects, an Ismaili Muslim[1]. The agents contacted Hassam, presented him with a list of primarily Ismaili names, and asked him if he recognized any of those listed. Hassam indicated that Sultan was a childhood schoolmate, but he professed he was unaware of his involvement in any illegal activities.

The agents decided that Hassam would pose as an insurance agent interested in exporting large sums of honest or ill-gotten gains out of the United States for clients. Hassam contacted Sultan in Dallas, renewed their acquaintance, and invited him and his wife Yasmin to meet him at his hotel. At that meeting, Hassam indicated that he was looking for a money launderer, and asked Sultan for a recommendation. Sultan advised Hassam that he need look no further, as he had previously engaged in such activities in Africa.

Hassam and Sultan eventually agreed on the details of their business arrangement: money skimmed from the

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proceeds of legitimate businesses or derived from illicit drug trafficking would be transported out of the country by Sultan. For his efforts, Sultan would receive a "handling fee" equivalent to two and one-half percent of the sums laundered. Other details regarding their first transaction were left unresolved, and Hassam returned to his home in Virginia.

Over the next three months, Sultan and Yasmin cooperated with Hassam in completing several transfers of money out of the United States. Typically, Hassam would meet Sultan at an appointed location, deliver to him a large sum of money in either large bills or cashier's checks, and provide Sultan with information as to where the money should be delivered. Sultan would carry the cash out of the country, neglecting to declare it on the U.S. Customs forms that require disclosure of cash sums in excess of $10,000. After arriving in Brussels or Toronto, Sultan would deposit the money into an account in a specified bank. Later, he would cause the money to be transferred via wire to bank accounts in the United States established and maintained for the purposes of such sting operations.

Throughout this time, Yasmin assisted Sultan in these activities by relaying messages to him from Hassam, or occasionally accepting cash deliveries from Hassam in her husband's stead. On at least one occasion, Yasmin made the actual delivery of the money to Brussels.

Later, the government substituted undercover agent Ralph Jacoby for Hassam as Sultan's contact. Jacoby represented to Sultan that he needed very large sums derived from illegal drug operations exported out of the country. Jacoby and Sultan agreed to do business on terms similar to those arranged with Hassam, with Sultan expressing interest in trafficking even larger sums than before. For the next several months, Sultan and Yasmin continued transporting money out of the country, frequently enlisting the aid of two co-defendants not parties to this appeal.

By the year's end, the government felt it had sufficient evidence to bring Sultan, Yasmin, and the two co-defendants to trial, so it suspended the sting operation for approximately six months. The government later reactivated the scheme, hoping to ferret out additional members of Sultan's organization. With renewed interest, Sultan and Yasmin revived their laundering activities, dealing with Agent Jacoby as before. By the time of their arrest, the players had laundered over $1.5 million dollars, for which the Allibhais received over $76,000 in commissions.

Sultan, Yasmin, and two co-defendants were tried on twenty-four counts of conspiracy, money laundering, failing to file IRS currency transaction reports, failing to file customs reports, travel in interstate commerce with the intent to carry on unlawful activities, and wire fraud. Sultan was convicted on all counts, while Yasmin was convicted on three and acquitted on three. From those convictions, Sultan and Yasmin take this appeal.

I.

Targeting: A Right to Be Let Alone?

The appellants premise their contention that they were impermissibly targeted by the government's sting operation on two separate grounds. First, they argue that the government engaged in outrageous conduct, and, lacking reasonable suspicion that they were involved in any illegality, violated their "right to be let alone." Alternatively, Sultan argues that targeting based upon religious affiliation violates their first amendment right to freedom of religion. We reject both contentions.

In *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973), the Supreme Court foreshadowed the evolution of an outrageous conduct defense deriving from the fifth amendment due process clause. Although the court concluded that predisposition to commit a crime forecloses

application of the entrapment defense, it conceded that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from ... obtain[ing] a conviction." *Id.* at 431-32, 93 S.Ct. at 1642-43. Since *Russell,* courts have addressed the availability of the outrageous conduct defense, always recognizing that it "can only be invoked in the rarest and most outrageous circumstances." *United States v. Tobias,* 662 F.2d 381, 387 (5th Cir. 1981), *cert. denied,* 457 U.S. 1108, 102 S.Ct. 2908, 73 L.Ed.2d 1317 (1982).

Based on these principles, the appellants argue that the government's conduct in approaching Sultan with the money laundering scheme was egregious enough to constitute a due process violation. A litany of cases in which more extreme government behavior was upheld by courts suggests a contrary conclusion. In *Russell,* when the target of a government sting operation confessed difficulty in obtaining a scarce drug precursor, the government supplied it to him, and later provided a buyer for the finished product. Even so, our court refused to characterize the government's conduct as "outrageous."

Similarly, in *Tobias,* a suspect canceled an order for cocaine precursor chemicals placed with a DEA-operated sham company, complaining of his inability to perform the complicated synthesis steps. Undercover DEA agents suggested he attempt the simpler PCP synthesis process, and provided him with the needed chemicals, "recipes," and instructions to make the drug. Our court found no due process violation, noting that Tobias's "insistent participation" in the PCP production scheme foreclosed a finding of outrageous government conduct. *See also, United States v. Simpson,* 813 F.2d 1462 (9th Cir.), *cert. denied,* 484 U.S. 898, 108 S.Ct. 233, 98 L.Ed.2d 192 (1987) (where the court upheld the government's actions in persuading an informant to offer sexual favors to entice a targeted person into selling her heroin); *United States v. Emmert,* 829 F.2d 805 (9th Cir. 1987) (where

an agent's offer of $20,000 and the use of threats and intimidation to persuade an impoverished college student to locate a cocaine supplier were not considered "outrageous"). In light of those authorities, we find no due process violation in this context either.

We also join our sibling circuits in rejecting the suggestion raised by the Allibhais that the government should have reasonable suspicion that an individual is involved in some illegality before targeting him in a sting operation. Relying on *Olmstead v. United States,* 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed.2d 944 (1928), the Allibhais contend the "right to be let alone" protects citizens from unwarranted and capricious governmental intrusions.[2] Accordingly, they ask that this court impose a reasonable suspicion requirement on the government even though other circuits have refused similar invitations. We likewise decline.

Those circuits that have addressed this issue have uniformly dismissed the notion that the government must have a pre-existing basis for suspecting criminal activity before targeting an individual in an investigation.[3] The only contrary decision was recently reversed en banc, bringing the Ninth Circuit in accord with the others.[4]

As the court recognized in *United States v. Jacobson,* 916 F.2d 467, 469 (8th Cir. 1990) (en banc), *cert. granted in part,*

[2] Their argument derives from Justice Brandeis's famous dissent in *Olmstead,* in which he characterized the "right to be let alone" as "the most comprehensive of rights and the most valued by civilized men." *Olmstead,* 277 U.S. at 478, 48 S.Ct. at 564.

[3] *See e.g., United States v. Jacobson,* 916 F.2d 467, 469 (8th Cir. 1990) (en banc), *cert. granted in part,* 59 U.S.L.W. 3723 (April 26, 1991); *United States v. Miller,* 891 F.2d 1265, 1269 (7th Cir. 1989); *United States v. Jenrette,* 744 F.2d 817, 824 & n.13 (D.C. Cir. 1984), *cert. denied,* 471 U.S. 1099, 105 S.Ct. 2321, 85 L.Ed.2d 840 (1985); *United States v. Jannotti,* 673 F.2d 578, 609 (3d Cir.) (en banc), *cert. denied,* 457 U.S. 1106, 102 S.Ct. 2906, 73 L.Ed.2d 1315 (1982); *United States v. Myers,* 635 F.2d 932, 940-41 (2d Cir.), *cert. denied,* 449 U.S. 956, 101 S.Ct. 364, 66 L.Ed.2d 221 (1980).

[4] *See United States v. Luttrell,* 889 F.2d 806 (9th Cir. 1989), *vacated in part and modified,* 923 F.2d 764 (9th Cir. 1991).

59 U.S.L.W. 3723 (April 26, 1991), these decisions are premised upon the realization that "[a defendant] has no constitutional right to be free of investigation." *Jacobson,* 916 F.2d at 469. Thus, "the mere fact the undercover investigation is started without reasonable suspicion 'does not bar the conviction of those who rise to its bait.' " Id., *quoting Jannotti,* 673 F.2d at 609. We note that as a practical matter, investigative agencies will rarely expend their limited manpower and resources on a mere whim, or in fabricating criminal activity. In circumstances where an investigation unfortunately ensnares a non-predisposed individual, the defense of entrapment serves as an effective bar to conviction. Accordingly, we find no basis upon which to create a contrary rule from that of our siblings.

Finally, we address the appellants' contention that they were impermissibly targeted, in violation of their first amendment rights, because they are Ismaili Muslims. The Allibhais note that the government utilized the informant Hassam, himself an Ismaili, to gain access to their close-knit community. Hassam was initially questioned about possible money laundering activities involving Ismailis, and was presented with a list of almost exclusively Ismaili suspects. These facts notwithstanding, we find no impropriety.

Although its holding does not specifically address investigative targeting, the Supreme Court's recent opinion in *Employment Division Dept. of Human Resources v. Smith,* 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) provides some insight into the interplay between the first amendment and the enforcement of criminal laws. In that case, two Native Americans were fired because of their use during a religious ceremony of peyote, a controlled hallucinogenic substance. When the state ruled that their "misconduct" disqualified them from receiving unemployment benefits, they filed suit, arguing that the ruling violated their first amendment free exercise rights. In approving the state's actions, the court noted, "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid

law prohibiting conduct that the state is free to regulate." 110 S.Ct. at 1600.

Although we recognize that this is not a Free Exercise Clause case, we consider the court's teachings in *Smith* persuasive on this issue. Ismaili Muslims are not "relieved...from obedience to a general law not aimed at the promotion or restriction of religious beliefs." *Id., quoting Minersville School Dist. Bd. of Educ. v. Gobitis,* 310 U.S. 586, 594-595, 60 S.Ct. 1010, 1012-1013, 84 L.Ed. 1375 (1940). Thus, where the government seeks to enforce a "valid and neutral law of general applicability," *Smith,* 110 S.Ct. at 1600, the fact that an investigation incidentally targets a specific religious group does not render the investigation violative of the first amendment. We reject any contrary suggestion, and uphold the district court's decision not to dismiss the indictment.

Expert Testimony

The Allibhais attempted to call John Costain as an expert witness to testify as to the meaning of taped conversations between the Allibhais, Hassam, and Jacoby. Costain, then a private investigator, had significant law enforcement experience, but admittedly had never handled a money laundering case. In response to the government's objection, the trial court requested a proffer of the scope of Costain's testimony, going as far as to permit defense counsel to examine Costain out of the presence of the jury.

The court ruled that the defense was impermissibly attempting to use Costain's testimony to buttress Sultan's. Furthermore, since the court concluded the content of the taped conversations was within the understanding of lay jurors, it ruled the jury was in as good a position as Costain to interpret the meaning of those conversations. Finally, the court indicated that the limited probative value of Costain's testimony was outweighed by the risk that the jury would be confused by his analysis.

Sultan notes that the court permitted the government's

witnesses, Agents Marshall and Jacoby, to speculate as to the significance of certain statements made by Sultan and Yasmin, as well as to comment on why certain evidence was never discovered. Accordingly, they argue the trial court erred in refusing to permit them to rebut that testimony with Costain's.

Reviewing the trial court's decision on the admissibility of that evidence for an abuse of discretion, *United States v. Schmidt,* 711 F.2d 595, 598 (5th Cir.), *cert. denied,* 464 U.S. 1041, 104 S.Ct. 705, 79 L.Ed.2d 169 (1983), we are persuaded by the government's arguments to the contrary. As noted, Marshall and Jacoby testified regarding events in which they participated, such as taped conversations, or the execution of search warrants. In contrast, Costain's testimony represented a third party's appraisal of events in which he was not involved.

We are also impressed by the district court's painstaking *in limine* review of the proffered testimony. By permitting defense counsel to elicit sample testimony from Costain outside the presence of the jury, the Allibhais were afforded ample opportunity to demonstrate the admissibility of the evidence. *See United States v. De Luna,* 763 F.2d 897, 912 (8th Cir.), *cert. denied,* 474 U.S. 980, 106 S.Ct. 382, 88 L.Ed.2d 336 (1985).

Finally, as to the district court's determination that Costain's testimony was excludable based on the risk of jury confusion, see Federal Rule of Evidence 403, we note that our court gives particular deference to the trial court's assessment in this realm. *United States v. Edelman,* 873 F.2d 791, 795 (5th Cir. 1989). Accordingly, we find no abuse of discretion in the trial court's ruling.

The Jury Charge

Although neither appellant challenges the jury's finding regarding entrapment, both contend that the trial court's instruction as to that defense was erroneous. Assuming

without deciding that both appellants were entitled to the entrapment charge,[5] we find no reversible error.

The appellants first object to the portion of the charge that addresses acceptable conduct of undercover agents:

> The undercover activity may take many forms, including persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward or pleas based on need, sympathy, or friendship.

The Allibhais note that this language has never been sanctioned by this circuit, and that by approving such tactics, the district court eviscerated the entrapment defense. As both parties concede, we review a jury instruction to determine whether "the charge, as a whole, is a correct statement of the law and whether it clearly instructed the jurors as to the principles of law applicable to the factual issues confronting them." *United States v. Stacey*, 896 F.2d 75, 77 (5th Cir. 1990). A trial judge is given substantial latitude in tailoring an instruction so long as it fairly and adequately addresses the legal issues presented. *United States v. Pool*, 660 F.2d 547, 558 (5th Cir. Unit B 1981).

Although our court has never specifically reviewed the exact language contained in this charge,[6] we have approved

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[5] The government maintains because Yasmin was recruited to participate in the money laundering scheme by her husband rather than a government agent, she cannot claim she was "entrapped" as a matter of law. *See United States v. Sarmiento*, 786 F.2d 665, 667-668 (5th Cir. 1986). Yasmin challenges that contention, arguing that her presence at the initial meeting between Hassam and Sultan subjected her to the risk of entrapment. Because we find no reversible error in the charge, we need not resolve that factual dispute.

[6] We note that the Ninth Circuit has approved identical language in *United States v. North*, 746 F.2d 627 (9th Cir. 1984), cert. denied, 470 U.S. 1058, 105 S.Ct. 1773, 84 L.Ed.2d 832 (1985). Rejecting North's contention that the instruction improperly sanctioned threats and coercive activities on the part of law enforcement agents, that court noted that viewing the instruction as a whole, it "clearly distinguished between the issues of

(continued on page 11)

instructions that suggest that behavior typically unbecoming law enforcement officials is appropriate in the context of an undercover operation. *See e.g., United States v. Mattoni*, 698 F.2d 691, 694 (5th Cir. 1983) (where our court approved an instruction indicating that "agents had a right to assume other identities, change their character, [and] make offers to sell or provide controlled substances"); *Pool*, 660 F.2d at 557 (where an instruction that "it is proper for a government agent to pretend to be someone else and to offer either directly or through an informer or other decoy to engage in an unlawful transaction" was upheld); *United States v. Fera*, 616 F.2d 590 (5th Cir. 1980) (approving an instruction that it is "sometimes necessary and permissible for the government to use stratagems, artifices, ruses, and undercover agents or investigators that may use assumed names and conceal their true identities...").

Furthermore, because the entrapment defense "focus[es] on the intent or predisposition of the defendant to commit the crime ... rather than upon the conduct of the Government's agents," *Hampton v. United States*, 425 U.S. 484, 488, 96 S.Ct. 1646, 1649, 48 L.Ed.2d 113 (1976), the charge is adequate if it focuses the jury's attention on whether "the Government's deception actually implant[ed] the criminal design in the mind of the defendant ..." *Russell*, 411 U.S. at 436, 93 S.Ct. at 1645. Because we find that this charge, as a whole, adequately focused the jury's inquiry on the question of predisposition, we find no reversible error.

Next, the appellants complain that the charge instructing the jury to consider the applicability of the entrapment defense separately as to each count of the indictment was improper. We are unpersuaded.

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[7] *(Continued)*
improper government behavior and North's predisposition to commit illegal acts." *Id.* at 631. We reject the appellants' suggestion that the Ninth Circuit's subsequent opinion in *United States v. Hoyt*, 879 F.2d 505, 510 & n.5 (9th Cir. 1989) implicitly rejects, dilutes, or limits that court's holding in *North*.

As the government notes, the Fifth Circuit Pattern Jury Instructions admonish juries to consider each count in an indictment separately from other joined counts. *See Fifth Circuit Pattern Jury Instructions* § 1.24 (1990). It is apparent that the charge actually benefitted the Allibhais, since it permitted the jury to consider the applicability of the defense to each count. Absent such a charge, if the jury found Yasmin and Sultan were not entrapped at the outset of the sting, it would not need to consider whether subsequent events affected their predisposition to engage in later laundering activities. Accordingly, the Allibhais may not claim prejudice from any instruction, since it places an even greater burden on the government. *United States v. Garrett,* 583 F.2d 1381, 1388-89 (5th Cir. 1978).

Finally, the appellants contend that the trial judge should have instructed the jury not to consider evidence of Sultan's prior money laundering activities in Africa. In support of the district court's decision to refuse the requested instruction, the government cites *United States v. Larson,* 722 F.2d 139, 143 n.8 (5th Cir. 1983), *cert. denied,* 466 U.S. 907, 104 S.Ct. 1688, 80 L.Ed.2d 161 (1984), a case holding that a jury may properly consider evidence of pre-indictment activities when the defendant asserts the entrapment defense. Although Larson involved conduct occurring *in the United States,* we find no logical basis to exclude Sultan's African activities from the scope of the *Larson* holding.

II.

Yasmin and Sultan each raise several challenges to the district court's application of the sentencing guidelines, disputing both the court's factual findings and its application of the guideline provisions to those findings. The Allibhais' sentences must be upheld unless they demonstrate they were imposed in violation of the law, as a result of an incorrect application of the guidelines, or were outside the range of the applicable guidelines and were unreasonable. 18 U.S.C. § 3742(e); *United States v. Ebertowski,* 896 F.2d 906 (5th Cir.

1990). This court must give "due regard to the opportunity of the district court to judge the credibility of witnesses" by accepting its findings of fact unless they are clearly erroneous. 18 U.S.C. 3742(e). Beyond even the clearly erroneous standard, this court must give "due deference to the district court's application of the guidelines to the facts." *United States v. Woolford,* 896 F.2d 99 (5th Cir. 1990). Finding no error, we uphold the sentences imposed by the district court.

Organizer Status

Sultan argues that the district court improperly enhanced his sentence under section 3B1.1(a) based on its finding that he was the "organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." Although Sultan does not dispute that he was the organizer of the money laundering ring, he does quibble with the court's finding that his organization was "otherwise extensive." Relying on cases from other circuits, Sultan argues that such a finding has typically been sustained when the government infiltrates an ongoing money laundering business involving "clients" other than the undercover operatives. *See e.g., United States v. Donahue,* 885 F.2d 45 (3d Cir. 1989); *United States v. Cuevas,* 847 F.2d 1417 (9th Cir. 1988), *cert. denied,* 489 U.S. 1012, 109 S.Ct. 1122 (1989). We are unpersuaded.

The evidence adduced at trial and in the sentencing investigation reveals that Sultan's organization was indeed extensive. His money laundering scheme took him to at least two foreign countries, and spanned almost three years. Furthermore, by the time of his arrest, Sultan had laundered over one million dollars, and had expressed the willingness and capability to handle even larger sums of ill-gotten gains. Although the scheme involved only four participants,[8] Sultan

[8] Because we conclude Sultan's organization is "otherwise extensive" within the meaning of § 3B1.1(a), we need not address the government's strained argument that unwitting employees of the Belgian and Canadian banks used by Sultan may be included in determining whether "five or more participants" were involved in the scheme.

"used the unknowing services of many outsiders" such as bank employees, a fact deemed relevant in the Commentary to the section. *See* U.S.S.G. § 3B1.1, comment. (n.2) Accordingly, we find no error in the district court's application of this enhancement provision.

Acceptance of Responsibility

Both Yasmin and Sultan contend that the district court erred in denying them the two level reduction for acceptance of responsibility. Under U.S.S.G. § 3E1.1, such a reduction is permitted "[i]f the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct." U.S.S.G. § 3E1.1. Because the sentencing judge is in the best position to gauge genuine contrition, "the standard of review under this provision is even more deferential than under the clear error standard." *United States v. Roberson,* 872 F.2d 597, 610 (5th Cir.), cert. denied, 110 S.Ct. 175, 107 L.Ed.2d 131 (1989). Reviewing the district court's assessment accordingly, we find no error.

Relying on the Sixth Circuit's opinion in *United States v. Fleener,* 900 F.2d 914, 918 (6th Cir. 1990), the appellants argue that the district court improperly denied them the section 3E1.1 reduction based on their decision to plead the defense of entrapment. Even if we were bound by that decision, we would still disagree with the Allibhais' interpretation of it. In *Fleener,* the government concocted a sting operation targeted at individuals trafficking in child pornography. At trial, Fleener argued that he had been entrapped by the undercover agent; the jury disagreed, and found him guilty. At sentencing, the district court found he had accepted responsibility for his actions, and afforded him the two-level reduction. The government appealed, arguing that the defendant's resort to the entrapment defense *completely barred* application of section 3E1.1. The Sixth Circuit affirmed, however, holding that "the district court did not err in considering a reduction for acceptance of responsibility even though [Fleener] raised an entrapment defense at trial."

Thus, the *Fleener* decision does not *entitle* a defendant to the reduction, but merely permits a district court to consider section 3E1.1 even when the defendant pleads entrapment.[8] In this case, the district judge noted that even though the Allibhais professed contrition at sentencing, their attitudes at trial "did not comport with the sort of attitude that this reduction in offense level is for." Even assuming that some of the sentencing judge's remarks suggest he considered the Allibhais' resort to the entrapment defense, these remarks are irrelevant, since the judge need not give reasons for his denial of the section 3E1.1 reduction in this circuit. *United States v. Hardeman,* No. 90-8342 (5th Cir. May 31, 1991). We will not disturb the district court's decision to deny the reduction for acceptance of responsibility.

Calculating Yasmin's Base Offense Level

Yasmin first contends that the district court erroneously calculated her base offense level by considering laundered sums for which her husband was convicted, but for which she was acquitted. We disagree.

Because the government need only establish facts for use in sentencing by a mere preponderance of the evidence, our court has held that the sentencing court may rely on facts underlying an acquitted count if the preponderance standard is satisfied. *United States v. Juarez-Ortega,* 866 F.2d 747, 748 (5th Cir. 1989). Although the jury was not convinced beyond a reasonable doubt that Yasmin was criminally responsible for the total sum laundered, the district court concluded that

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[8] We also note the significance of the posture of the *Fleener* decision. Unlike our case, the government challenged the district court's decision to award the reduction. Reviewing that decision deferentially, the Sixth Circuit *affirmed.* Here, the appellants request that this court reverse the district court's assessment of the law and facts of this case. As our court has noted, and as the *Fleener* court recognized, our deferential standard of review "will nearly always sustain the judgment of the district court in this area." *Fleener,* 900 F.2d at 917, quoting *United States v. Thomas,* 870 F.2d 174, 176 (5th Cir. 1989).

the evidence preponderated towards her involvement in even the acquitted counts. We find no error in that decision, and thus reject her contention.

Next, Yasmin contends that the district court improperly applied section 2S1.3(a)(1)(C) to enhance her base offense level because she "reasonably should have believed that the [laundered] funds were criminally derived property." In support of this argument, she relies on polygraph reports and her own statements that she thought the money was legitimately procured. However, the district court need not credit Yasmin's self-serving testimony, and is free instead to consider other evidence, such as the way Yasmin handled the funds, in concluding that she was aware of their character. We are unwilling to disturb the district court's credibility determination in this regard.

Minimal/Minor Participant Status

Yasmin also argues that she was entitled to a reduction in her base offense level because she was a relatively insignificant player in her husband's scheme. We are unmoved.

Guideline section 3B1.2 provides a two to four level reduction in the base offense level for those offenders found to be relatively less culpable than others involved in the same scheme or conspiracy. *See United States v. Buenrostro*, 868 F.2d 135, 137 (5th Cir. 1989). The guidelines define "minimal participant" as one who demonstrates a "lack of knowledge or understanding of the scope and structure of the enterprise." U.S.S.G. § 3B1.2, comment. (n.1). A "minor participant" is similarly defined as one who is "less culpable than most other participants, but whose role could not be described as minimal." *Id.* (n.3). Because most offenses are committed by participants of roughly equal culpability, our court has noted that "it is intended that [the adjustment] will be used infrequently." *United States v. Nevarez-Arreola*, 885 F.2d 243, 245 (5th Cir. 1989). We are unpersuaded by Yasmin's suggestion that either classification applies to her.

Yasmin performed an important role in the laundering scheme: she relayed messages between Sultan and their "clients," counted the money to verify the sums, and on at least one occasion actually transported the money to Belgium. We find no clear error in the district court's conclusion that Yasmin was not a minor or minimal participant in these activities.

Constitutionality of the Guidelines

Finally, Yasmin argues that the district court's application of the guidelines unconstitutionally deprived her of due process of law. Her contention that the court improperly considered hearsay testimony has been repeatedly dismissed by this court. *United States v. Ammirato,* 670 F.2d 552, 557 (5th Cir. 1982). Her arguments that the district court improperly attributed sums specified in the acquitted counts to her, and that she was erroneously denied a reduction for acceptance of responsibility, have been adequately addressed, and present no further constitutional concerns.

We also dismiss her argument that she has been punished because of her religious affiliation with the Ismaili Muslim faith. Yasmin points to a statement in the PSR noting that she should have been aware, "as an Ismaili Muslim," of the frequent practice of exporting cash out of the United States to the Aga Khan. However, the probation officer added that the activities for which Sultan and Yasmin were indicted were not connected to those religious practices. In fact, the court never even mentioned Yasmin's religious faith at sentencing. Accordingly, we find that the guidelines afforded Yasmin all the due process to which she was entitled.

Conclusion

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

AFFIDAVIT OF MAHOMED JAFFER

Background and Credentials

1. My name is Mahomed Jaffer. I am a graduate of the University of Dublin, Ireland (BA Hons. LLB), and a Barrister at Law from London. I am a practising Advocate of the High Court of Sind and of the Supreme Court of Pakistan. I am the senior partner of Orr Dignam and Co., Karachi – a firm of advocates specializing in Corporate and International Law.

2. I am a member of the Ismaili Muslim Community and have held or hold the following appointments made by His Highness the Aga Khan, the Imam of the Ismailis.

   a. President of the Ismailia District Council for Dacca, East Pakistan (1961 - 1969).

   b. Member of the Ismailia Federal Council for Pakistan (1969 - 1976).

   c. Hon. Secretary and subsequently Vice Chairman of the Aga Khan Foundation, Pakistan Branch (1974 onwards).

   d. Member of the governing body of the Aga Khan Hospital and Medical College Foundation (AKHMCF) Karachi (1976 onwards).

   e. Member – Owners Representative Board AKHMCF (1976 onwards).

   f. Member of the Ismaili Constitution Review Committee (1984 - 1987).

   g. Chairman, His Highness Prince Aga Khan Shia Imami Ismaili International Conciliation and Arbitration Board (July 1987 onwards).

h. Director, Aga Khan Rural Support Programme, Pakistan (1983 onwards).

Historically and until today, Ismailis consider it a privilege and honor to serve the Imam of the time and the Ismaili Community and in this respect I continue a family tradition of service extending over many decades. For example my father served the 48th and 49th Imams for over fifty years in India, Syria and East Africa in an honorary capacity in numerous Councils, administrative and other assignments.

This affidavit is submitted by me to assist the reader in understanding the Ismaili faith and the Ismaili community. In particular, I wish to provide information to explain the practice of our community in making offerings to the Imam, and to explain why these offerings are made in secret and with the utmost confidentiality.

Ismailis in History

3. The Shia Imami Ismaili Muslims believe like all Muslims worldwide in the unity of Allah, and that the Holy Prophet Muhammad is the last and final Prophet of Allah. They believe that Islam, as revealed in the Holy Koran is the final message of Allah to mankind and is universal and eternal. Monotheism is one of the fundamentals of Islam, and of the Ismaili Muslim interpretation and Practice of Faith. The Ismaili Shia Muslim community represents today some 20 million people, in some 50 countries, located principally in the Soviet Union, China, Afghanistan, Iran, Pakistan, India, BanglaDesh, Kenya, Tanzania, Uganda, Ruanda, Burundi, Zaire, Madagascar, the United Kingdom, the United States, Canada, Malaysia, the Gulf countries, Syria, France, Portugal, etc.

4. The hereditary Ismaili Imamat is one of the oldest institutions of the Islamic world. After the death of the Holy Prophet Muhammad in AD 672, the majority of

Muslims accepted leadership of the faith by public choice. This majority became known as the Sunni Muslims. The minority – known as Shia – believe, in accordance with their doctrine, tradition and interpretation of history that the Holy Prophet appointed his cousin and son-in-law, Hazrat Ali to be the first Imam to continue the interpretation and teaching of Allah's final message and to guide the followers. The Holy Prophet Muhammad proclaimed that the Imamat should continue by heredity through Hazrat Ali and his daughter Hazrat Bibi Fatima and their descendants. From that time succession to the Imamat has been by way of designation, it being the absolute prerogative of the Imam of the time to appoint his successor from amongst any of his male descendants.

5. In the course of history divergences emerged as to the succession to the Imamat of the Shia Muslims, the principal one being at the time of the seventh Imam (about 765 A.D.). The majority of Shias followed and accepted the succession of a particular Imam, which succession they believe continued up to the time of the twelfth Imam – who disappeared in infancy – after which they believe the Imam is in "permanent seclusion." Such Shia are mainly in Iran and are known as the Twelver Shia.

6. The minority of the Shia Muslims accepted the succession of Imam Ismail as the seventh Imam, about 765 A.D. and thus became known as the Ismailis. The Ismaili Muslims of today therefore have a history and unbroken tradition extending to 1400 years.

7. The Ismailis believe that the authority of the Imam is testified by the act of allegiance by the follower to the Imam which is the act of acceptance by the follower of the permanent spiritual bond between the Imam and the follower. This allegiance unites all Ismaili Muslims worldwide in their loyalty, devotion and obedience to

the Imam within the Islamic concept of universal brotherhood. It is distinct from the allegance of the individual follower to his land of abode, where his loyalty is to the country of which he is a citizen.

8. Today the Ismaili Muslims believe in and revere Shah Karim Al-Hussaini, His Highness Prince Aga Khan as the Forty-Ninth Imam of the Ismaili Muslims, in direct lineal descent from the Holy Prophet Muhammad through Hazrat Ali and Hazrat Bibi Fatima. The present Imam, Shah Karim Al-Hussaini, succeeded his late Grandfather to the office of Imamat on 11th July 1957, 32 years ago.

9. From the time of Hazrat Ali the Imams of the Ismaili Muslims have ruled over territories and peoples in various areas of the world at different periods of history and have exercised spiritual as well as temporal authority over their followers. For example during the Fatimid period of history (10th to 12th Century A.D.) the Ismaili Imams ruled from Egypt over vast territories all the way to North Africa. In keeping with the Shia Muslim tradition of promoting intellectualism and individualism, they encouraged research and learning everywhere they governed and established the Al-Azhar University in Cairo in AD 970, which continues as a major seat of learning even today. There have been many Ismaili scholars of world renown who have been pioneers in their respective fields. One example is Avicenna (Ibn Sina AD 980-1037), an outstanding physician whose "Book of Healing" and "The Cannon of Medicine" remained classic medical texts for centuries.

10. Historically and in accordance with Ismaili tradition, the Imam of the time is concerned with the spiritual advancement as well as the improvement of the quality of life of his followers. Traditionally, it is the Imam's teaching which lights the followers' path to spiritual

enlightenment and vision. In temporal matters, the Imam guides the followers, and motivates them to develop their potential.

Voluntary Offerings and Tradition of Secrecy

11. As with all religions, all Muslims are enjoined to give in the name of their faith. Sunni and Shia Muslims each have different rules governing these offerings, and these differences are recognized by both religious and secular law in most Islamic countries.

An Ismaili Muslim makes voluntary offerings to the Imam, as part of his religious duties and as an act of piety. Such offerings are strictly personal and unconditional and in no sense is the Imam a trustee or accountable to the follower for such offerings. The offerings are for the Imam individually and not for any member of his family. In former times such offerings were frequently made in person to the Imam. Since this is not possible in modern times, the offerings are made to the Mukhi – an honorary lay appointee of the Imam. Most Ismaili communities around the world have one or more Mukhis who preside for Ismaili prayers in congregational gatherings in Jamatkhanas – places designated by the Imam for congregational gatherings. Once such offerings are made to the Imam through the Mukhi the Ismaili follower is not aware of nor concerned with what happens thereafter. He has fulfilled his religious duty by tendering such offerings to the appointed representative of the Imam, the Mukhi.

12. In particular, each Ismaili considers his spiritual allegiance to the Imam to be a highly personal matter of faith and voluntary offerings to the Imam as a private matter between him and his spiritual leader as part of his religious duty. The offerings are made by virtue of the spiritual bond between the Imam and the individual follower, and it has been historically and

is today of the essence that they remain totally secret. This privileged bond of faith and trust between the individual Ismaili and the Imam of the time is both an historical and fundamental principle of the Shia Ismaili interpretation and practice of the Islamic faith and is never breached by the Ismaili or by the Imam.

13. In the course of history, the Shia Muslims, and the Ismaili Muslims among them, have faced persecution for their faith. The specific Ismaili religious traditions mean that even today Ismailis in countries such as Afghanistan, China, Soviet Union and Iran live in fear and threat of persecution. As such and because of their specific religious tradition many Ismailis keep the practice of their faith private including the practice of making offerings to the Imam.

Since 1957, when the present Imam assumed office, so many political and religious upheavals have occurred in the developing world where most of the Ismailis live, that the privacy of their faith has continued to be a central objective. In the 1970's for example as a result of persecution by Idi Amin and by African Sunni Muslims in Uganda, the entire Ismaili Community had to flee and large numbers of them migrated to the United States, Canada and the United Kingdom where they have now settled thanks to the help and support received from the Governments of these countries. In addition, the persecution by the Marxist government in Mozambique caused the entire Ismaili community in that country to flee to Portugal within the last decade.

14. As Muslims have struggled to define their relationship with the non-Muslim industrialized West, the Islamic world has tended to split into "Modernists" and "Fundamentalists." His Highness the Aga Khan as Imam, and his immediate predecessor as Imam, Sir Sultan Mohamed Shah Aga Khan III, have refused to reject

today's world. They have, for example, advocated that women should play their rightful place in all activities of the Ismaili Community and in the societies in which they live. They have been pioneers in insisting that Ismaili Muslim women should not be veiled. As a consequence of Ismaili intellectualism, their strong sense of community and mutual support and their refusal to relegate the interpretation of their faith to medieval times, Ismailis face overt and sometimes aggressive hostility and criticism from segments of orthodox or fundamentalist Islam.

Social Welfare and Cultural Activities of the Aga Khan

15. In keeping with the traditional role of the Ismaili Imam, responsible both for the interpretation of the faith, as well as a source of leadership for members of the community to improve the quality of their lives, the Imams of the Ismaili Muslims have emphasized, encouraged and supported social welfare projects to help people improve their health, education and living standards. All such "social" projects, which have been open to all races and faiths, are funded largely by the Imams from the voluntary offerings of their followers and from their personal resources.

16. In order to structure the Imamat's social development activities in an organized manner, comprehensible to Ismailis and non-Ismailis alike, His Highness the Aga Khan established in Geneva, Switzerland, the Aga Khan Health Services (AKHS) and the Aga Khan Education Services (AKES) which are non-profit organizations with branches, subsidiaries and affiliates in many countries of the developing world in Asia and Africa. These enormous commitments in education and health care are largely concentrated in the developing world. They have grown rapidly in recent years to assist the populations of Third World countries of Asia

and Africa, and the Ismaili Community, to address the consequence of insufficient Government resources being made available to health and education. The shrinkage of Government resources has been caused by the dual forces of economic shrinkage and demographic explosion. At this time the Aga Khan Health Services provide health care to over 2,000,000 people per year, while the Education Services benefit over 500,000 children annually.

The Aga Khan Health Services network of health institutions, projects and programs includes hospitals in Bombay, India, in Nairobi, Mombasa and Kisumu in Kenya, and in Dar-es-Salaam in Tanzania, and the Aga Khan University teaching hospital in Karachi, Pakistan.

AKHS also operates over 200 maternity and child health centres, diagnostic clinics, dispensaries and day care centres. AKHS is particularly involved in promoting large scale primary health care programmes such as for vaccination, prevention of disease and elimination of goitre, for which it has received considerable recognition and support from the World Health Organization and UNICEF.

17. Similarly the Aga Khan Education Services operates over 300 educational institutions ranging from pre-primary to secondary and high schools, day care centres and student hostels, to specialized schools for the handicapped. Some 500,000 students receive education and participate in these programmes annually and there are over 5,000 young boys and girls who are recipients of scholarships, bursaries and educational assistance studying at all levels of education throughout the world in no less than 20 countries.

18. In addition to the Aga Khan Health and Education Services, His Highness the Aga Khan has established

four major international institutions, all non-sectarian which act as umbrella institutions for local service programs. They are:

1. **Aga Khan Foundation**
   Aga Khan Foundation, a philanthropic non-sectarian institution, applies its resources to innovative approaches and programmes of broad utility in resolving selected key problems of development in the fields of health, education and rural development.

   Among the many projects and programmes sponsored by the Aga Khan Foundation in Asia and Africa is the Aga Khan Rural Support Programme, Pakistan, established in 1983 as a non-profit development company with which I am personally familiar. Its primary objectives are to reduce poverty and to improve the quality of life of the inhabitants in the remote and virtually inaccessible high mountain valleys of the Northern Areas of Pakistan.

   The projects and programmes of AKRSP have benefitted over a million rural people and have attracted international funding, from several U.S. Agencies like USAID, and from CIDA, the UK Overseas Development Agency and the European Economic Community. An independent evaluation was undertaken in 1988 by the World Bank which commented very favorably on the methods and achievements of AKRSP and found AKRSP activities "have produced outstanding results."

2. **The Aga Khan University**
   The Aga Khan University is an international university established by law in the Islamic Republic of Pakistan.

   The Aga Khan University (AKU) – the first

privately funded University in Pakistan has established its first faculty – The Faculty of Health Sciences in Karachi in 1983. This includes a School of Nursing, a Medical College and a teaching hospital of 721 beds. The cost of establishing this University – over $300 million – was contributed by His Highness, the Aga Khan Foundation, and other well wishers, both in Pakistan and abroad. It is already making a significant contribution to medical education and research in Pakistan and elsewhere in the developing world, in particular due to its central role in the networking of Aga Khan Health units and programmes in India, Bangladesh, Kenya, Tanzania, Syria, etc. It emphasizes strongly primary care, for the under privileged and those living in the poorest areas and has already received considerable recognition.

AKU has entered into agreements with leading academic institutions including Harvard University in the United States and McMaster and McGill Universities in Canada, who are contributing to faculty and curriculum development at the Faculty of Health Sciences.

3. **Aga Khan Fund for Economic Development**
Aga Khan Fund for Economic Development fosters and supports economic development particularly in the developing countries, through projects which increase productivity, enhance income-earning opportunities and optimise the profitable use of local resources and reduce national and international third world indebtedness.

4. **Aga Khan Trust for Culture**
Aga Khan Trust for Culture identifies the contribution of Islamic civilizations to the human heritage in arts, literature, science, architecture, scholarship and other areas of learning. Aga Khan

Trust for Culture supports, encourages and promotes Islamic culture, the values it embodies and the forms of expression that ensure its authenticity, identity, creativity and continuity, and seeks to return some aspects of cultural life to modern productive activity in the Third World such as through programmes of rehabilitation of historic cities.

Constitution and Structure of the Ismaili Community

19. Ismaili Muslims believe that by virtue of his office as Imam, the Imam enjoys full authority of governance over and in respect of all religious and community matters of his followers. In accordance with the needs of the time, the Imams have given to their followers rules of conduct and constitutions in conformity with the Islamic concepts of unity, brotherhood, justice, tolerance and goodwill. Constitutions were thus given and were in force in many countries, but due to rapid changes in the lands of their abode and the strong recent internationalization of the Community, particularly towards the industrialized world, and the need for administrative structures to meet modern requirements, His Highness the Aga Khan appointed a Constitution Review Committee in 1984 of which I was a member. This Committee undertook a very comprehensive survey lasting three years of the needs and requirements of the Ismailis worldwide for the next 25 years and submitted its report to the Imam.

20. On December 13, 1986, His Highness Prince Aga Khan, The Forty-Ninth Imam of Shia Imami Ismaili Muslims ordained the Constitution of the Shia Imami Ismaili Muslims, applicable to all Ismaili Muslims worldwide in order to better secure their peace and unity, religious and social welfare, to foster fruitful collaboration between different peoples, to optimize the use of resources, and to enable Ismaili Muslims to make a

valid and meaningful contribution to the improvement of the quality of life of the societies in which they live. This constitution superseded the several constitutions applicable to Ismailis in different countries.

21. Under the Ismaili Constitution a careful administrative structure has been established worldwide, which includes National Councils, Tariqah and Religious Education Boards (Tariqah means the practices of faith), Grants and Review Boards and National Conciliation and Arbitration Boards. In addition there is an International Conciliation and Arbitration Board to assist any Ismaili to settle any differences or disputes with another party residing in another country in relation to commercial, business and civil liability matters, domestic and family matters, and in relation to matters of disciplinary action and to act as a final appellate authority in respect of decisions of any National Conciliation and Arbitration Board. In addition specific rules and regulations for different individual countries have been made by the Imam and provide for more detailed national administrative structures and matters. This was necessary to take account of different specific living environments in countries such as secular India, Islamic Pakistan, the Christian World, etc.

22. For the United States of America, there is established under the Ismaili Constitution a National Council and local Councils for Eastern, Mid-Western, South Western and Western United States. There is also a Tariqah and Religious Education Board with local Boards, a Grants and Review Board with local Boards, and a Conciliation and Arbitration Board with local Boards. Appointments to all Boards are made by the Imam for a term of three years.

23. The aims and objects of the Councils in relation to their respective areas of jurisdiction are the social

governance, administration, guidance, supervision and coordination of the activities of the Ismailis and their institutions and organizations, and their functions include to foster the unity of Ismailis, to preserve, protect and strengthen their social and cultural heritage, to endeavor to secure continuing improvement in their quality of life through appropriate policies and programs in education, health, social welfare, housing, economic welfare, cultural and women's activities, and youth and sports development.

24. The functions of the Tariqah and Religious Education Board include to provide religious education, for the training of religious teachers and for research and publication, including provision of a comprehensive program and curriculum of religious education, and publication of books and relevant religious material.

25. The functions of the Grants and Review Board include to ensure compliance with proper standards of financial discipline, accountability, and cost and management effectiveness by institutions which receive financial support from the Imam of the Ismailis.

26. The functions of the Conciliation and Arbitration Board include to assist in the conciliation process between parties in differences or disputes arising from commercial, business and other civil liability matters, and domestic and family matters and to act as an arbitration and judicial body to hear and adjudicate upon such matters and in respect of disciplinary action for the breach of the Ismaili Constitution and any Rules and Regulations made thereunder.

27. In strict keeping with the historical hereditary and institutional role of the Ismaili Imam, the provision of Jamatkhanas or congregational gathering halls and their maintenance as well as the entire range of activities of all Council, Boards and Institutions

established by the Ismaili Constitution are met by His Highness the Aga Khan as Imam from voluntary offerings made by Ismaili Muslims. In addition, all activities of the Apex Institutions and the programs and projects they sponsor and which serve Ismailis and non-Ismailis alike, are funded by the Imam and other cosponsors. The total annual contribution of the Imam is between $110 million and $120 million. These Apex Institutions also solicit and receive donations for their programs from well-wishers and supporters, Ismailis and non-Ismailis, including many international aid agencies.

All programs sponsored by all institutions funded by the Imam or the Apex institutions are non-sectarian and open to all without restriction as to religious faith or any other restriction. They include AKF, AKU, AKTC, AKHS, AKES, all of which render a genuine public service to those whom they serve and which are officially recognized for tax and other purposes, in most of the countries in which they operate.

Imam's Domicile in Geneva, Switzerland

28. Since Ismailis live increasingly in many countries throughout the world, with different types of governments and sometimes contrasting interests (India and Pakistan, Kenya and Tanzania, Afghanistan and the Soviet Union) it is essential for the Imam to select a place of domicile ensuring to him political neutrality, stability and complete freedom to fulfill his institutional responsibilities.

The city of Geneva, Switzerland, was selected and four generations of the Imam's family including the 48th Imam, have been domiciled there. The present Imam and his three children were born in Geneva. Switzerland is politically neutral and has a currency free to circulate worldwide. In addition, Geneva is a major

international center where many international organizations are located for it provides them too an enabling environment. Geneva is also a recognized ecumenical center.

Many of the international agencies with which the Aga Khan Development Network collaborates, including W.H.O. and the Red Cross, are based in Geneva. All the key components of the Network such as AKF, AKUF, AKHS, AKES, AKTC, AKFED are incorporated in Switzerland and report annually to the Federal Authorities in Bern.

29. The headquarters of the League of Nations (now succeeded by the United Nations) was in Geneva, and the predecessor of His Highness Prince Karim Aga Khan as Imam – Sir Sultan Mohamed Aga Khan – was the first president of the League of Nations.

The Imam's late father, uncle and brother have held or still hold high diplomatic office in the United Nations.

DATE: _____ _____

MAHOMED JAFFER

District of Columbia) ss:

Subscribed and sworn to before me, this 13 day of November, 19 89.

_____

Notary Public

My Commission Expires 11/30/93

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The Ismailis: A Short Survey

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This is intended to be a short survey on the background of the Ismailis. My goal will be to rapidly survey the emergence of Islam in the seventh century A.D. and then the split between Sunnis and Shi'ites, followed by comments on the subsequent development of subsects within Shi'ism. I will concentrate on a group called the Fatimids who were also called Ismailis. The Fatimids then split and a small group called the Nizaris appeared in Iran. In the early nineteenth century the leader of the Nizaris acquired the title Agha Khan and hence some people called his followers Agha Khanis. The center of the group's activities shifted to South Asia, particularly India, where they were often called Khojas. In the middle of the nineteenth century the Agha Khan won undisputed leadership of the community through a series of cases in the Bombay High Court. Today, the members of this sect can be found throughout the world, but particularly in India, East Africa, Britain, and Canada with a small body in the United States. Throughout this account I shall refer to them as Ismailis although they went through a variety of name changes – Ismailis, Fatimids, Nizaris, Agha Khanis, Khojas, Ismailis.

For Muslims, Islam is understood to mean submission to God [Allah is the Arabic word for God]. In order that humans understand the correct path, God chose Muhammad, an Arab living in the city of Mecca, as his final Prophet. God's words as received by Muhammad in Arabic and recorded by his followers [Muslims], constitute the Muslim holy book or Quran [also spelt Koran]. When Muhammad died in 632, there was no clear indication as to who should have been the

next leader. The majority of Muslims believed that the historical record of who became leader was meant to be even if they can't understand God's reasons for it. This group of Believers are called Sunnis. In fact, with the exception of Iran, the majority of Muslims in virtually every other country in the world are Sunnis. Sunni Muslims are expected to pay a voluntary alms tax (zakat) which is often collected by agents of the state and rarely goes directly into the hands of the religious elites.

There was a minority of Muslims who came to feel that after the death of Muhammad, leadership of the community should have gone to Ali who was Muhammad's first cousin and husband of Muhammad's daughter Fatima. The Arabic word for partisans or party is shi'a and thus those who wished Ali to be successor to Muhammad became known as the Party of Ali or Shi'a Ali which was quickly shortened to shi'a [other forms of the word include shi'ites while their beliefs are called shi'ism.]. The most important difference between Sunnis and Shi'ites was that the latter believed that Ali and then his descendants were to be leaders of the community. Most Shi'ites also believed that these descendants of Ali were divinely inspired, something like the belief in the infallibility of the Pope by pious Catholics.

Over the next century and a half the Shi'ites began to split into a variety of subgroups. One, called the Twelvers, believed that the twelfth member of the family of Ali had gone into occultation, that is, he had withdrawn from the earth and had not died. Until he returned, the religious leaders of the Twelvers would act on his behalf and they would receive directly the alms [*zakat*] from their followers. To jump ahead of my story, in the eighteenth century the Twelver religious leaders who now represent the majority of Muslims in Iran had a series of debates about the powers of the religious leaders who were acting for the Hidden Twelfth leader. They agreed that those clerics with the highest degree of learning should act in his place and should interpret doctrine as well as collect the alms without giving those sums to the

State. They also created a series of titles for the more learned religious leaders with the highest called Ayatollahs. Therefore, the former Ayatollah Khomeini derived his religious power from a particular Shi'ite tradition and his financial resources when in exile from the Shi'ite tradition of paying alms directly to their religious leaders without any accounting for the sums.

I should also add that since Sunnis tended to persecute Shi'ites, all the branches tended to go underground and often followers pretended to be Sunnis in order to avoid persecution. This concern about being persecuted for being a Shi'ite has continued into the twentieth century.

Another group of Shi'ites in the ninth century believed that leadership of the community should have gone to Ismail. This group was called the Ismailis or Seveners since Ismail was the seventh in their line of successors. The Ismailis then claimed that the leadership went to a family who claimed descendant from Ismail through the line of Ali and Fatima and were called Ismailis (or Fatimids). In 969 the dynasty captured Egypt and built for themselves a new capital called Cairo.

Another crisis arose in the 1090's in Cairo when the political leaders put a boy on the throne as Fatimid leader in order to control him. A group of Ismaili Shi'ites in Iran and Syria believed that the true leader should have been a man called Nizar. This group which was very active became known as the Nizaris. They then took a radical step and claimed that the concept of divine leadership could be passed on to someone who was not biologically related to the dynasty in Egypt (or to Ali for that matter). Therefore the leader of the Nizaris (claiming to be the true Ismailis) established himself in Iran and began to propagate his beliefs in that region. This period of Nizari activities came to an end in the 1250's when the Mongols destroyed their headquarters in Iran.

The Nizari [Ismaili] movement then went underground with most of the followers claiming to be Sunnis but accepting

the doctrines of the Nizari leader. They also paid alms taxes directly to that leader or his representatives. Ironically, while facing persecution in Iran, members of the Nizari sect found a more fertile field in India and began spreading their beliefs there. In India the followers of the Ismaili-Fatimid-Nizari tradition were called Khojas. According to most scholarly accounts, they also began incorporating a number of Hindu ideas into their practices and belief system, although members of the Nizari [Ismaili] community would deny it.

In the nineteenth century a number of extremely significant developments took place within the community. In 1819, in reaction to the murder of the Nizari leader by some Sunnis, the ruler of Iran who needed the support of the Nizari community, publicly recognized the new leader of the Nizari community and gave him the title Agha Khan. This is how the leader acquired the title and why some outsiders call the community the Agha Khanis. The first Agha Khan died in 1881, the second in 1885, the third in 1957, and the current leader of the Ismailis holds the title of the Fourth Agha Khan.

Unfortunately developments in Iran went badly for the Ismailis and by 1840 the Agha Khan had to flee to India where a large community of followers had already emerged, especially in Bombay. In the 1840's the Agha Khan became involved in a major court case involving the issue of inheritance within the community. The result of this case was that the Khojas [Ismailis] were recognized as a sect of Islam but with their own special inheritance laws.

Two decades later an even more important case arose involving a direct challenge to the power of the Agha Khan to collect alms and not have to account for them. The specifics of the case included a challenge of the Agha Khan to appoint mukhis (treasurers) who could also serve as the local religious leader in the Ismaili house of worship called a Jama'a Khana.

The presiding British High Court Judge, Justice Joseph Arnould, used this as an opportunity to collect as much historical data on the community as was possible and most

modern studies of the community draw upon his work as a base. Justice Arnould declared that the Khojas were Shi'ites of the Ismaili persuasion; that by being members of the community Khojas [Ismailis] had given an implied consent to the position of the Agha Khan; that all gifts such as alms given to the Agha Khan were his to use as he saw fit, although the Justice noted the long record of charitable activities by the Agha Khan; and that the Agha Khan had a particular, religious position as a leader whose claim could be traced to the Nizaris in Iran to the Fatimids in Egypt and back to Ali. [The Imamate]. The British courts reconfirmed the Agha Khan's financial powers and religious position again in 1885.

The powers, prestige, and responsibilities of the Agha Khan are incredible when we compare them with most other religious traditions. And, if one is to be a believing, practicing member of the Ismaili community, it is necessary to accept them. In terms of a financial obligation, an Ismaili is to give between one-tenth and one-eighth of his income to the Agha Khan as alms. [Unlike Sunni Islam, this alms is called a dassondh which means one-tenth.] The principal agent for collecting or transmitting the sums is the mukhi who is to be an honored member of the community. Neither the mukhi nor other local officials keep accounts of the sums raised but are to pass the money on to higher officials until it reaches the Agha Khan or agents designated by him to represent him.

There are a number of traditions about what happens to the Believer who fails to pay the alms tax. One says that those failing to pay the dassondh and to recognize the infallibility of the Imam [Agha Khan], will pass through a cycle of 84 rebirths before being considered for salvation. For those who fulfill their obligations, salvation comes immediately. Another tradition records that the Ismaili who fails to pay the *dassondh,* the one-tenth will turn to fire, the remaining nine-tenths to wood and everything he owns will burn.

Because the Ismailis have been persecuted in a number of areas, the most recent being East Africa, and because they

lack a national homeland, the dassondh or tithe was collected in bullion, cash, or other easily transmitted forms of wealth. The process was kept secret for fear that the enemies of the sect including the State would confiscate the money. Neither the mukhi nor any other member know how much money is annually given nor how it is used.

In 1936 in honor of his golden jubilee, the Third Agha Khan was given his weight in gold; in 1946 he was given his weight in diamonds for his Diamond Jubilee. While these are exceptional activities, it does indicate that the Ismailis through the mukhis donate large sums to their leader. Fortunately, the community has an outstanding reputation for charitable work [although contributions are not tax deductible]. Support from the Agha Khan is associated with hospitals, schools, development projects in areas where there are large numbers of Ismailis as well as in the Third World in general. Ismailis also have an excellent reputation for public service. For example, the uncle of the present Agha Khan served as head of the U.N. Commission on Refugees for many years. He now lives in retirement in Geneva.

Author's background:

As for my credentials, I hold a Ph.D. from the University of Michigan where I specialized in Islamic history. My B.A. is from Trinity College (Hartford, Conn.) and my M.A. is from Harvard. I joined the University of Washington in 1967 as an Assistant Professor of Middle Eastern history. I am currently a full professor, chair of the Department of History, and Director, Middle East Center, Jackson School of International Studies. I have authored or edited three books and about 40 articles. In addition, I co-produced a twelve part t.v. series on Islamic history and art and co-curated five exhibitions entitled The Warp and Weft of Islam.

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No. 91-751

In the Supreme Court of the United States

OCTOBER TERM, 1991

SULTAN ALLIBHAI and YASMIN ALLIBHAI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

1. Whether the Due Process Clause requires that the government have reasonable suspicion that a person has engaged or will engage in criminal activity before the government may initiate a criminal investigation of that person.

2. Whether the government initiated the investigation of petitioners because of their religion.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. 1-17, is reported at 939 F.2d 244.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1991. The petition for a writ of certiorari was filed on November 4, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner Sultan Allibhai was convicted on 22 counts charging

conspiracy, money laundering, failing to file Internal Revenue Service currency transaction reports, travel in interstate commerce with intent to carry on unlawful activities, and wire fraud, in violation of 18 U.S.C. 371, 1343, 1956(a)(2)(A) and (a)(3), and 31 U.S.C. 5313(a). Yasmin Allibhai, Sultan's wife, was convicted on three counts charging conspiracy, failing to file IRS currency transaction reports, and failing to file a customs report when exporting more than $10,000, in violation of 18 U.S.C. 371, 31 U.S.C. 5313(a), and 31 U.S.C. 5316. Sultan Allibhai was sentenced to concurrent terms of imprisonment totaling 136 months. Yasmin Allibhai was sentenced to concurrent terms totaling 30 months' imprisonment. The district court imposed a three-year period of supervised release as to each petitioner. The court of appeals affirmed.

1. a. In May 1987, British customs officials notified the United States Customs Service that for a number of years Nizamudin Allibhai (who is not related to petitioners) had been transferring about $1,000,000 per month illegally from the Dallas-Fort Worth area to London, England. The British authorities also reported that they were investigating petitioner Sultan Allibhai and one of his businesses. Gov't C.A. Br. 3.

In June 1987, Nizamudin Allibhai arrived in London with $928,000 in cash. British customs officers informed American authorities of the serial numbers of some of the bills, and the Internal Revenue Service determined that all of the bills had been issued by a bank near the Dallas airport. IRS agents discovered that Nizamudin Allibhai had no account at that bank, but that petitioners were signatories on several corporate accounts with that bank. That information led the IRS to begin an investigation of petitioners. Gov't C.A. Br. 3-4.

b. In March 1988, IRS agents recruited Bahadurali Hassam to assist them in detecting money launderers in the Dallas area. The agents recited a list of names to Hassam and asked whether he recognized any of them. Hassam recognized some of the names, including Sultan Allibhai. Hassam told the agents that he knew of no wrongdoing by Sultan Allibhai. Hassam added that he and Sultan Allibhai were members of the Ismaili Muslim religious faith, and that it was not uncommon for a co-religionist who had a retail business to talk openly during social events or following religious ceremonies about skimming money. Hassam agreed to pretend to be a money launderer in search of an outlet to launder funds consigned to him. He also consented to contact Sultan and others on the list of suspects. Gov't C.A. Br. 4-5.

On April 2, Hassam attended a wedding in Dallas; petitioners also were wedding guests. After the wedding, petitioners met Hassam in his hotel room where they renewed acquaintances and discussed various subjects, including money laundering. Hassam told Sultan Allibhai that he was looking for people who knew how to launder money. Sultan replied, "Why ask about the other people. This is my business. I have been doing it from Africa. You know me, we go back a long way." Sultan offered to charge a fee of only 2½ percent for laundering money although the prevailing rate was twice that amount. Gov't C.A. Br. 5-6. Thereafter, Hassam provided petitioners with government funds, which petitioners laundered. Gov't C.A. Br. 6-11.[1]

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[1] The first transaction was in the amount of $50,000. Petitioner Sultan Allibhai took the money to a brokerage house in Brussels, Belgium. He turned the money over to his contact,

The government subsequently decided to phase out Hassam and to substitute an undercover agent to act as the provider of the money to be laundered. On June 7, Hassam introduced petitioner Sultan Allibhai to undercover agent Ralph Jacoby. Sultan told Agent Jacoby that he had an experienced money laundering operation and that the money would be returned within seven working days. Agent Jacoby transferred $200,000 to Sultan, together with a $5,000 fee. Sultan demanded a 4 percent fee in the future. In mid-June, the money was delivered to the Brussels brokerage house by Sultan's associate. By June 23, the money had been returned by wire transfer to the Florida undercover bank account. Gov't C.A. Br. 11-13.

On seven more occasions between late June and September 1988, Agent Jacoby furnished petitioner Sultan Allibhai with amounts ranging from $95,000

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who arranged for a wire transfer of the funds from the brokerage house's account in a Swiss bank to an undercover account at a bank in Florida. The $50,000 was received by the undercover account on April 27. Gov't C.A. Br. 7-9.

On May 25, Hassam delivered $100,000 in government funds to petitioner Yasmin Allibhai. He also furnished the number of an undercover account in California, to which the laundered money was to be sent. Three days later Yasmin took the money to the brokerage house in Brussels. At the time of her departure from the United States she did not disclose to the customs officers, as required by law, that she was in possession of more than $10,000. Gov't C.A. Br. 9-10.

On June 6, Hassam notified petitioner Sultan Allibhai that the bank in California had not confirmed the receipt of $100,000. Sultan replied that the same laundering system had been employed and that he believed the receipt of a confirmation from the bank to be imminent. The brokerage house in Brussels transferred the $100,000 by wire to the California bank that day. Gov't C.A. Br. 10-11.

to $211,000 for laundering. On each occasion Sultan arranged for the money to be transferred to an undercover bank account either by way of the brokerage house in Brussels or with the aid of an associate at the Toronto Currency Exchange. After a hiatus, the laundering activity resumed in May 1989. Sultan received $100,000 and a fee that had risen to 7 percent. That money was successfully laundered through the brokerage house in Brussels. On June 19, Sultan met with Agent Jacoby, expecting to receive more than $1,000,000. Instead, Sultan was arrested. Gov't C.A. Br. 13-22.

2. The court of appeals affirmed. Pet. App. 1-17. The court rejected petitioners' claim that the Constitution requires that the government have reasonable suspicion that a person has committed or will commit a crime before the government may investigate that person. *Id.* at 4-7. The court also rejected petitioners' claim that they were investigated because they are Ismaili Muslims. The court ruled that because the First Amendment Free Exercise Clause does not except Ismaili Muslims from neutral, generally applicable criminal laws, the fact that an investigation incidentally targets members of a specific religious group does not violate the First Amendment. *Id.* at 8.

ARGUMENT

1. Petitioners maintain that their convictions must be set aside because the government had no reason to suspect that they had been or would be involved in criminal activity before the government conducted an undercover investigation of them. Pet. 6-9. Contrary to petitioners' claim, no such reasonable suspicion is required, and the government's investigation was wholly proper.

a. There is no conflict among the circuits on the question whether the government must have reasonable suspicion that a person has committed or will commit an offense before the government may commence an investigation of that person. Every court of appeals to consider the issue, including the Fifth Circuit in this case, has rejected the contention that the Constitution imposes such a reasonable suspicion requirement. *United States* v. *Osborne*, 935 F.2d 32, 35-36 (4th Cir. 1991); *United States* v. *Chin*, 934 F.2d 393 (2d Cir. 1991); *United States* v. *Luttrell*, 923 F.2d 764 (9th Cir. 1991) (en banc); *United States* v. *Jacobson*, 916 F.2d 467, 469 (8th Cir. 1990) (en banc), cert. granted on other grounds, 111 S. Ct. 1618 (1991) (No. 90-1124);[2] *United States* v. *Miller*, 891 F.2d 1265, 1269 (7th Cir. 1989); *United States* v. *Driscoll*, 852 F.2d 84, 87 (3d Cir. 1988);

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[2] The Court limited its grant of certiorari in *Jacobson* to the question whether petitioner was entrapped as a matter of law. Nevertheless, petitioner and amici in *Jacobson* discussed the reasonable suspicion question presented by the certiorari petition in this case. We also addressed that question after pointing out that it was not properly before the Court. Because the Court did not grant review in *Jacobson* to decide the reasonable suspicion question, this Court need not hold the petition in this case pending the Court's decision in *Jacobson*.

United States v. *Jenrette*, 744 F.2d 817, 824 & n.13 (D.C. Cir. 1984), cert. denied, 471 U.S. 1099 (1985); *United States* v. *Gamble*, 737 F.2d 853, 860 (10th Cir. 1984); *United States* v. *Thoma*, 726 F.2d 1191, 1198 (7th Cir.), cert. denied, 467 U.S. 1228 (1984); *United States* v. *Jannotti*, 673 F.2d 578, 609 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982); *United States* v. *Myers*, 635 F.2d 932, 940-941 (2d Cir.), cert. denied, 449 U.S. 956 (1980).

b. There is no merit to petitioner's claim. In *United States* v. *Russell*, 411 U.S. 423, 431-432 (1973), this Court noted that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." The Court in *Russell* held, however, that no such due process violation was shown in that case. In fact, this Court has never found an investigative technique to be so offensive as to violate due process and to prohibit the government from prosecuting the defendant, in spite of several invitations to do so. See *Hampton* v. *United States*, 425 U.S. 484 (1976); *United States* v. *Payner*, 447 U.S. 727, 737 n.9 (1980). In any event, simply initiating an investigation without any prior suspicion of wrongdoing has never been held to violate due process. Because an individual "has no constitutional right to be free of investigation," *United States* v. *Jacobson*, 916 F.2d at 469, when "the conduct of the investigation itself does not offend due process, the mere fact that the investigation may have been commenced without probable cause does not bar the conviction of those who rise to its bait," *United States* v. *Driscoll*, 852 F.2d at 87.

c. Even if this Court were to adopt the rule that a suspicionless investigation violates due process, pe-

titioners would not benefit from such a rule. Before petitioners became the subjects of the undercover investigation, the government had reasonable suspicion that they would become involved in money laundering. In mid-1987, the government received information from British customs officials that the British government was investigating a Sultan Allibhai and one of his corporations for money laundering, and that an investigation of Nizamudin Allibhai's money laundering activities resulted in the discovery that money he had spirited away to Great Britain had been obtained from a bank in which he did not have an account, but in which petitioners and their corporations did. That information warranted a suspicion that petitioners may have been involved in Nizamudin Allibhai's misconduct.

2. Section 5316 of Title 31 requires that a bearer of funds report that he is carrying more than $10,000 when departing this country. That statute is precisely the type of neutral, generally applicable law that can be applied to the members of a religious organization without violating the First Amendment. See *Employment Division Dep't of Human Resources* v. *Smith*, 494 U.S. 872 (1990). Petitioners do not argue to the contrary. Instead, they claim that they were made the subject of this investigation because they are Ismaili Muslims. Pet. 9-14. Based on that conclusory allegation, petitioners challenge the right of the government to investigate ethnic or religious groups without reasonable suspicion, and they urge the Court to adopt a rule barring such investigations on First Amendment grounds.

The short answer to petitioners' argument is that the record does not support their premise. To establish a claim of discriminatory law enforcement, peti-

tioners have the burden of establishing that the government's investigation had both a discriminatory effect and a discriminatory purpose. See *Wayte* v. *United States*, 470 U.S. 598, 608-610 (1985). Petitioners have failed to carry that burden. There is no doubt that petitioners, Nizamudin Allibhai, and Hassam all were members of the Ismaili Muslim sect. It also may be true, as petitioners assert, Pet. 3-4 n.1, that members of that sect must tithe to the Aga Khan and that tithes are sent abroad to places where the Aga Khan can gain access to the funds. But that is beside the point. Nothing in the record shows that the government initiated this investigation to stifle the flow of properly recorded funds to the Aga Khan, instead of for the legitimate purpose of determining whether petitioners were laundering money, whatever its ultimate destination might be. And there was no evidence that any of the money transfers in which petitioners engaged related to their alleged religious obligations. Under these circumstances, petitioners have not stated a valid First Amendment claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NO. 91-751

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

SULTAN ALLIBHAI AND YASMIN ALLIBHAI,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY ON PETITION FOR CERTIORARI

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A reply is warranted to the extent the government mischaracterizes the appellate holding and the state of the record. The government treats as a settled question the motive for the investigative targeting in this case. It asserts that the appellate court "rejected petitioners' claim that they were investigated because they were Ismaili Muslims." In fact, because the district court restricted cross-examination on the subject and denied the requested evidentiary hearing, the evidence is incomplete and conflicting on that question. The circumstances leading to Allibhai's selection as a target have never been fully illuminated nor any factual finding made on the subject.

The assertions that the record does not support petitioners' premise and that petitioners failed to make a sufficient factual showing of discriminatory targeting are disingenuous. The trial court denied petitioners the opportunity to develop the record on this question. On appeal, petitioners requested a remand for an evidentiary hearing. The appellate court did not specifically address that request, effectively holding that even if agents chose targets based on religious affiliations, no constitutional violation occurred.

The court did not, as the government asserts, reject that motive as a factual matter.

The government's summary of the evidence on this point is incomplete. Special Agent Scott Marshall, who headed the investigation, did testify that a British Customs agent's tip regarding Sultan Allibhai launched the investigation. What the government leaves out is the same British Customs agent's affidavit to the effect that there never was any investigation of Sultan Allibhai or any tip to American agents.[1] (TS 14; CR 587.)

The government treats as settled a matter that was excluded from evidence at the trial and not addressed by the appellate court. It suggests that petitioners failed to make a sufficient showing, when in fact they were denied the opportunity to develop the record and protested that ruling on appeal! The question of the motive for investigation was not resolved; rather it was held

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[1] Moreover, the government suggests an affiliation between Nisamudin Alibhai and Sultan Allibhai, implying that the investigation of Nisamudin legitimized the targeting of the Sultan. In fact, no evidence suggested a relationship between the two men. They merely shared a similar last name (the government's brief misspells Nizamudin's name; in fact the two spell their surnames differently) and maintained accounts at the same bank.

inconsequential. It is the propriety of that ruling that is now before the Court.

DATED this 6th day of January, 1992.

Respectfully submitted,

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